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OFFICE OF APPEAL HEARINGS
DEPT OF CHILDREN & FAMILIES

STATE OF FLORIDA
DEPARTMENT OF CHILDREN AND FAMILIES
OFFICE OF APPEAL HEARINGS

APPEAL NO. 14F-03578

PETITIONER,

Vs.

CASE NO.

AGENCY FOR HEALTH CARE ADMINISTRATION
CIRCUIT: 11 Dade
UNIT: AHCA

RESPONDENT.
_________________________________/

FINAL ORDER

Pursuant to notice, an administrative hearing was convened telephonically in this matter before the undersigned hearing officer on June 11, 2014, at 3:10 p.m.

APPEARANCES

For the Petitioner:
Petitioner's Mother

For the Respondent: Mara Perez
Senior Human Services Program Specialist
Agency for Health Care Administration

STATEMENT OF ISSUE

The issue is whether the decision of the Agency for Health Care Administration to deny the petitioner's request for a second cochlear implant is correct.

PRELIMINARY STATEMENT

[REDACTED] the petitioner's mother, appeared on behalf of the petitioner, [REDACTED] ("petitioner"), who was not present. [REDACTED] may sometimes hereinafter be referred to as the petitioner's "representative".

Mara Perez, Senior Human Services Program Specialist with the Agency for Health Care Administration (sometimes hereinafter referred to as "respondent", "AHCA" or the "Agency"), appeared on behalf of the Agency for Health Care Administration. The following appeared as witnesses on behalf of the Agency: Marc Kaprow, D.O., Long-Term Care Medical Director for United Healthcare; and Susan Frischman, Senior Compliance Analyst with United Healthcare.

The petitioner introduced Composite Exhibit "1", inclusive, at the hearing, which was accepted into evidence and marked accordingly. The respondent introduced Exhibits "1" through "8", inclusive, all of which were accepted into evidence and marked accordingly. At the respondent's request, the hearing officer took administrative notice of the Hearing Services Coverage and Limitations Handbook, July 2007.

The hearing record in this matter was left open until the close of business on July 16, 2014 for the petitioner's mother to provide additional information. Once received, this information was accepted into evidence and marked as petitioner's Exhibit "2" and the record was closed.

FINDINGS OF FACT

Based on the oral and documentary evidence presented at the final hearing and on the entire record of this proceeding, the following findings of fact are made:

1. The petitioner is a [redacted] with severe to profound bilateral hearing loss.

2. Petitioner was eligible to receive Medicaid services at all times relevant to this proceeding.

3. The petitioner is enrolled in United Healthcare. United Healthcare is a health maintenance organization ("HMO") contracted by the Agency for Health Care Administration to provide services to certain Medicaid eligible recipients in Broward County. The petitioner is enrolled in the United Healthcare Community Plan.

4. The petitioner had a unilateral cochlear implant surgically implanted in his right ear on September 13, 2013.

5. The cochlear implant was activated on October 15, 2013.

6. The petitioner's Cochlear Implant Evaluation was completed by [redacted] CCC/A. It is dated June 4, 2013 and provides the following Summary:

> Combined aided results with [Petitioner]'s Phonak Milo Plus UP BTE hearing aids indicate that even when tested with appropriate hearing aids [Petitioner] does NOT have sufficient access to sounds/speech. Results demonstrated a profound sensorieural hearing loss bilaterally. Aided thresholds reveal minimal benefit for both ears and does [*sic*] not demonstrate any progress when using hearing aids. It is apparent that although he is currently wearing amplification in both ears, [Petitioner] is not receiving optimal sound with hearing aids. Cochlear implantation will greatly affect his ability to develop proper speech and language like typical hearing peers. [Petitioner] will benefit greatly with cochlear implants so that she [*sic*] can have access to speech sounds to be able to develop language.

7. The Cochlear Implant Evaluation concludes: "Audiologically, [Petitioner] is a bilateral cochlear implant candidate."

8. Despite petitioner being a candidate for bilateral cochlear implantation, the petitioner's doctor favored sequential implantation and submitted a prior authorization request for a single cochlear implant in his right ear after the evaluation was completed.

9. On December 13, 2014, United Healthcare received a prior authorization request for a second cochlear implant to be implanted in the petitioner's left ear.

10. After review, United Healthcare issued a notice denying the petitioner's request for a second cochlear implant on December 27, 2013.

11. The December 27, 2013 letter denying the request for a second cochlear implant states as follows:

> Based on the information submitted, we determined that the service(s) is/are not authorized.
>
> The specific reason for our decision: Your son's doctor asked for a hearing aid (Cochlear implant). This is denied. Based on the health plan rules, only one hearing aid is allowed. That is why the second hearing aid is denied. Florida Medicaid Hearing Services Coverage and Limitations Handbook, referenced.

12. The petitioner's representative filed an appeal with United Healthcare disputing the denial of the second cochlear implant. The appeal was received by United Healthcare on February 5, 2014.

13. After review, United Healthcare issued a notice denying the petitioner's appeal on March 3, 2014.

14. The March 3, 2014 letter denying the petitioner's appeal states as follows:

> Your appeal was reviewed by a doctor specializing in pediatrics. As part of our review, we look at information you or your child's provider gave us. We also look at your child's benefits. Based on our review of your appeal, we have determined that the service you requested cannot be approved. We made the decision because this does not meet Florida Medicaid Hearing Services Coverage and Limitations Handbook criteria. It says

that only one cochlear implant is covered. Your child has an implant in his right ear. This is why we cannot approve this service. Please talk about this with your child's doctor.

15. Petitioner's representative introduced into evidence redacted copies of five letters from the Agency for Health Care Administration to Medicaid recipients indicating Florida Medicaid agreed to reimburse for a second cochlear device and implantation. Since the letters are redacted, there is no method of determining whether each of the letters was addressed to a different Medicaid beneficiary.

16. Each of the letters referred to in the previous paragraph indicate that the second cochlear devices and implantations were approved pursuant to requests for "Medically Necessary Special Services".

17. The respondent has a special procedure in place for requesting Medically Necessary Special Services. These procedures differ from those used to request other services.

18. Petitioner's mother was provided with the forms to be used in requesting Medically Necessary Special Services shortly before the hearing.

19. It is the position of the petitioner's mother that the central auditory system requires sound input in the first few years of life if central auditory development is to occur. She explained her understanding that the window of opportunity is known as the "critical" or "sensitive" period and appears to be maximal in the first 3.5 years of life.

20. It is also the position of the petitioner's mother that bilateral cochlear implantation may result in a number of benefits including: improvements in sound localization; hearing in noisy environments; speech recognition; identifying the direction of a sound; and ensuring the better ear is implanted.

21. The respondent's position is that a second cochlear implant cannot be approved because Medicaid policy specifically states that Medicaid will only pay for one cochlear device. The doctor testifying for the respondent also provided his opinion that a second cochlear implant is not medically necessary at this time and that it would be contrary to generally accepted medical standards to put the petitioner through a second invasive surgical procedure within such a short period of time. He explained that there is no evidence demonstrating that a second cochlear implantation should be completed or that it should be done right now.

22. The doctor testifying on behalf of the respondent stated only forty to forty-five percent (40-45%) of children with hearing loss may experience some improvement associated with the implantation of a second cochlear device and that bilateral cochlear implantation is not a proven therapy. He explained bilateral cochlear implantation should be evaluated on a case by case basis.

23. The doctor testifying on behalf of the respondent provided his opinion that the audiologic evaluation submitted to United Healthcare in support of bilateral cochlear implantation does not include all of the information necessary to determine whether a second cochlear device is necessary.

24. Florida Medicaid and United Healthcare both follow evidence-based medicine practice. Evidence-based medicine uses the current best evidence in making decisions about the care of individual patients. Presently, sequential implantation would allow for observation prior to the implantation of a second cochlear device.

25. Petitioner's mother testified at the hearing she moved to Florida knowing that Florida Medicaid would only pay for one cochlear implant. She decided to request

a second cochlear device for her son when she learned that she could appeal the decision if her request was denied.

CONCLUSIONS OF LAW

26. By agreement between the Agency for Health Care Administration (AHCA) and the Department of Children and Families, AHCA has conveyed jurisdiction to the Office of Appeal Hearings to conduct this hearing pursuant to Chapter 120.80, Fla. Stat.

27. This is a final order pursuant to § 120.569 and § 120.57, Fla. Stat.

28. This hearing was held as a de novo proceeding pursuant to Fla. Admin. Code R. 65-2.056.

29. The petitioner in the present case is requesting a new service. Therefore, in accordance with Fla. Admin. Code R. 65-2.060(1), the burden of proof is assigned to the petitioner.

30. The standard of proof in an administrative hearing is a preponderance of the evidence. The preponderance of the evidence standard requires proof by "the greater weight of the evidence," (Black's Law Dictionary at 1201, 7th Ed.).

31. The Florida Medicaid program is authorized by Chapter 409, Fla. Stat. and Chapter 59G, Fla. Admin. Code. The Medicaid program is administered by respondent.

32. Section 409.912, Fla. Stat. states, in relevant parts:

> **Cost-effective purchasing of health care.**—The agency shall purchase goods and services for Medicaid recipients in the most cost-effective manner consistent with the delivery of quality medical care ...
>
> (3) The agency may contract with health maintenance organizations certified pursuant to part I of chapter 641 for the provision of services to recipients. This subsection expires October 1, 2014.

33. The Florida Medicaid Provider General Handbook – July 2012 is incorporated by reference in the Medicaid Services Rules by Fla. Admin. Code Rule 59G-5.020. In accordance with the above Statute, the Handbook states on page 1-27

> Medicaid contracts with Health Maintenance Organizations (HMOs) to provide prepaid, comprehensive, cost-effective medical services to enrolled Medicaid recipients.
>
> Medicaid pays each HMO a monthly capitation fee for managing and providing care to each enrolled recipient. In accordance with certain contractual agreements with Medicaid, the HMO provides a specified, comprehensive package of medical services for this monthly Medicaid fee.
>
> Medicaid HMOs are also required to provide quality and benefit enhancements and can provide other expanded benefits as described in this section.

34. Pages 1-28 of the Florida Medicaid Provider General Handbook provide a list of HMO covered services. These services include hearing services.

35. Page 1-30 of the Florida Medicaid Provider General Handbook states: "An HMO's services cannot be more restrictive than those provided under Medicaid fee-for-service."

36. In order for hearing services to be approved, they must be determined to be medically necessary and be in compliance with all provisions set forth in the Florida Medicaid Hearing Services Coverage and Limitations Handbook – July 2006 ("Hearing Services Coverage and Limitations Handbook").

37. The Florida Medicaid Hearing Services Coverage and Limitations Handbook – July 2006 is incorporated by reference in the Medicaid Services Rules by Fla. Admin. Code Rule 59G-4.110.

38. The definition of medically necessary is found in the Fla. Admin Code. R.

59G-1.010 which states:

> (166) 'Medically necessary' or 'medical necessity' means that the medical or allied care, goods, or services furnished or ordered must:
> (a) Meet the following conditions:
> 1. Be necessary to protect life, to prevent significant illness or significant disability, or to alleviate severe pain;
> 2. Be individualized, specific, and consistent with symptoms or confirmed diagnosis of the illness or injury under treatment, and not in excess of the patient's needs;
> 3. Be consistent with generally accepted professional medical standards as determined by the Medicaid program, and not experimental or investigational;
> 4. Be reflective of the level of service that can be safely furnished, and for which no equally effective and more conservative or less costly treatment is available; statewide; and
> 5. Be furnished in a manner not primarily intended for the convenience of the recipient, the recipient's caretaker, or the provider...
> (c) The fact that a provider has prescribed, recommended, or approved medical or allied care, goods, or services does not, in itself, make such care, goods or services medically necessary or a medical necessity or a covered service.

39. Since petitioner is under 21, a broader definition of medically necessary applies to include the Early and Periodic Screening, Diagnosis, and Treatment Services (EPDST) requirements. Section 409.905, Fla. Stat., Mandatory Medicaid Services defines Medicaid services for children to include:

> (2) EARLY AND PERIODIC SCREENING, DIAGNOSIS, AND TREATMENT SERVICES.--The agency shall pay for early and periodic screening and diagnosis of a recipient under age 21 to ascertain physical and mental problems and conditions and provide treatment to correct or ameliorate these problems and conditions. These services include all services determined by the agency to be medically necessary for the treatment, correction, or amelioration of these problems, including personal care, private duty nursing, durable medical equipment, physical therapy, occupational therapy, speech therapy, respiratory therapy, and immunizations.

40. Section 409.913, Fla. Stat. governs the oversight of the integrity of the Florida Medicaid Program. Section (1)(d) sets forth the "medical necessity or medically necessary" standards, and states in pertinent part as follows

> "Medical necessity" or "medically necessary" means any goods or services necessary to palliate the effects of a terminal condition, or to prevent, diagnose, correct, cure, alleviate, or preclude deterioration of a condition that threatens life, causes pain or suffering, or results in illness or infirmity, which goods or services are provided in accordance with generally accepted standards of medical practice....

Section (1)(d) goes on the further state:

> ...For purposes of determining Medicaid reimbursement, the agency is the final arbiter of medical necessity. Determinations of medical necessity must be made by a licensed physician employed by or under contract with the agency and must be based upon information available at the time the goods or services are provided.

41. Section (1)(d) highlights that the Agency makes the final decision regarding whether or not a requested service is medically necessary; however, the hearing officer is the final decision making authority for the Agency. See § 120.80, Fla. Stat.

42. The Hearing Services Coverage and Limitations Handbook, on Page 2-23, defines the purpose of cochlear implant services as follows: "Cochlear implant services provide restoration of auditory capacity to Medicaid eligible recipients with hearing loss that is not improved through the use of a hearing aid."

43. The Hearing Services Coverage and Limitations Handbook, on Page 2-24, explains as follows: "The physician who performs the cochlear implant procedure must obtain prior authorization from Medicaid before providing the implantation.

44. The Hearing Services Coverage and Limitations Handbook, on Page 2-25, directs: "Medicaid reimburses for one cochlear implant in either ear. Medicaid does not reimburse for bilateral cochlear implantation."

45. The petitioner in the present case had a cochlear device implanted in September 2013, which was approved and paid for by Medicaid. The Hearing Services Coverage and Limitations Handbook explicitly states that Medicaid will not reimburse for bilateral cochlear implantation. Therefore, the respondent correctly denied petitioner's request for a second cochlear implant. The petitioner's mother offered into evidence copies of letters from the Agency for Health Care Administration purportedly approving bilateral cochlear implantation for other Medicaid recipients. The respondent's witness testified that any bilateral cochlear implants approved by the Agency would be the result of a request for Medically Necessary Special Services. Such a request would undergo a different process for approval than the one utilized in this case.

46. Pursuant to the above, the petitioner has not met his burden of proof that the Agency for Health Care Administration incorrectly denied his request for a second cochlear implant.

47. This Order does not purport to state the petitioner would not potentially benefit from a second cochlear implant, just that the respondent correctly denied the request pursuant to the timing of the request and the information submitted to it for review. Should the petitioner continue to feel that a benefit would be derived from a bilateral cochlear implant, petitioner is encouraged to continue seeking approval of the second implant through the process for Medically Necessary Special Services.

DECISION

The petitioner's appeal is hereby DENIED.

NOTICE OF RIGHT TO APPEAL

This decision is final and binding on the part of the agency. If the petitioner disagrees with this decision, the petitioner may seek a judicial review. To begin the judicial review, the petitioner must file one copy of a "Notice of Appeal" with the Agency Clerk, Agency for Health Care Administration, 2727 Mahan Drive, Tallahassee, FL 32308-5403. The petitioner must also file another copy of the "Notice of Appeal" with the appropriate District Court of Appeal. The Notices must be filed within thirty (30) days of the date stamped on the first page of the final order. The petitioner must either pay the court fees required by law or seek an order of indigency to waive those fees. The petitioner is responsible for any financial obligations incurred as the agency has no funds to assist in this review.

DONE and ORDERED this 30th day of July, 2014,

in Tallahassee, Florida.

Peter J. Tsamis
Hearing Officer
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Copies Furnished To: [redacted] Petitioner
Rhea Gray, Area 11, AHCA Field Office Manager